Nos. 14-1167, 14-1195

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**HOSPITAL OF BARSTOW, INC.,
D/B/A BARSTOW COMMUNITY HOSPITAL**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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HOSPITAL OF BARSTOW, INC. d/b/a BARSTOW COMMUNITY HOSPITAL	)	
Petitioner/Cross-Respondent	)	Nos. 14-1167, 14-1195
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos. 31-CA-090049
Respondent/Cross-Petitioner	)	31-CA-096140

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board ("the Board") certify the following:

A. Parties, Intervenors, Amici. Hospital of Barstow, Inc., d/b/a Barstow Community Hospital ("Barstow") is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. Barstow, the Board's General Counsel, and the California Nurses Association/National Nurses Organizing Committee ("the Union") appeared before the Board in Cases 31-CA-090049 and 31-CA-096140.

B. Ruling Under Review. The case involves Barstow's petition to review and the Board's cross-application to enforce a Decision and Order the Board issued on August 29, 2014, reported at 361 NLRB No. 34.

C. Related cases. The ruling under review has not previously been before the Court or any other court. A related case, *Fallbrook Hospital,* 360 NLRB No. 73, 2014 WL 1458265 (Apr. 14, 2014) (oral argument held Jan. 8, 2015), is currently pending before the Court pursuant to Fallbrook's petition for review (Docket No. 14-1056) and the Board's cross-application for enforcement (Docket No. 14-1094).

/s/ Linda Dreeben
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Dated at Washington, DC
this 24th day of March, 2015

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Barstow Community Hospital ("Barstow") to review, and on the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board Order issued against Barstow finding it committed multiple violations of its duty to bargain in good faith with the California Nurses Association/National Nurses Organizing Committee ("the

Union"). The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Board's Decision and Order issued on August 29, 2014, and is reported at 361 NLRB No. 34. (A. 455-65.)[1]

The Court has jurisdiction over these consolidated proceedings under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the Board's Order is final with respect to all parties. Barstow filed a petition for review on September 3, 2014, and on October 7, the Board filed a cross-application for enforcement. Both were timely; the Act places no time limit on such filings.

STATEMENT OF THE ISSUES

1. Whether Barstow forfeited Issues 1, 5, 10, 11, 12, 13, and 15 by failing to pursue them in the Argument portion of its brief, and therefore whether the Board is entitled to summary enforcement of the uncontested portions of its Order.

2. Whether substantial evidence supports the Board's finding that Barstow violated the Act by refusing to submit any proposals or counterproposals until the Union submitted its entire contract proposal.

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[1] "A." refers to the parties' joint deferred appendix, filed on March 16, 2015. "SA." refers to the Board's supplemental appendix filed March 24, 2015. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

3. Whether substantial evidence supports the Board's finding that Barstow violated the Act by declaring impasse and refusing to bargain unless the Union directed unit employees to stop using the "assignment despite objection" form.

4. Whether the Board properly exercised its broad remedial discretion in ordering Barstow to reimburse the Union for its negotiating expenses.

5. Whether the Board reasonably declined to defer the case to arbitration.

6. Whether Barstow waived its challenge to the certification by recognizing and bargaining with the Union.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are found in the Addendum.

STATEMENT OF THE CASE

Shortly after the Board's June 29, 2012 certification of the Union, the parties began negotiations for a first contract. By September 26, the Union had submitted its entire set of proposals, while Barstow had offered no proposals, no counterproposals, and had hardly discussed the Union's proposals. By this time, Barstow had also unilaterally changed the procedures for conducting and reimbursing nurses for mandatory job certifications. In October and November, Barstow finally produced some counterproposals, but then, on December 28,

before the parties had covered all of the collective-bargaining issues, Barstow refused to bargain unless the Union directed the nurses to stop using certain reporting forms. When the Union rejected the demand and offered, again, to bargain over all matters including the forms, Barstow declared impasse on all issues and abandoned negotiations.

Based on charges filed by the Union, the Board's General Counsel issued a consolidated complaint alleging that Barstow violated Sections 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain in good faith and by unilaterally implementing changes to the terms and conditions of employment. Following a hearing, an administrative law judge found merit to the allegations and issued a decision and recommended order.[2] (A. 464.) On review, the Board found Barstow's exceptions meritless and issued a decision affirming the judge's findings, but modifying the recommended decision and remedy to include an additional violation and an additional special remedy. (A. 455-61.)

[2] In May 2013, around the same time as the hearing, the Board sought and later obtained a temporary injunction under Section 10(j) of the Act (29 U.S.C. § 160(j)) directing Barstow to bargain in good faith with the Union and rescind its unilateral changes. *Rubin v. Hosp. of Barstow, Inc.*, No. ED CV 13-933, 2013 WL 3946543 (C.D. Cal. July 29, 2013).

I. THE BOARD'S FINDINGS OF FACT

A. Background; Barstow Nurses Vote in Favor of the Union; Barstow Files Objections to the Election; the Board Certifies the Union

Barstow is an acute care facility in Barstow, California, owned by a parent company, Community Health Systems ("Community Health"). The Union sought to represent Barstow's registered nurses. On May 1, 2012, Barstow and the Union executed a consent election agreement, which provided that the Board's Regional Director would handle objections or challenges to the election and that her determination would be final. At some point before the election, the Union and Community Health tentatively agreed to certain collective-bargaining issues including retirement benefits, union security, and recognition, as well as arbitration of disputes. The Union and Community Health never executed the pre-election agreement. (A. 455, 461; 31, 49-51, 134-38, 155-62, 176-82, 193-274.)

On May 10, the nurses voted 38-19 in favor of the Union. On May 17, Barstow filed two timely objections to conduct affecting the election. The Regional Director investigated and dismissed the objections and, on June 29, certified the Union as the representative of the 68 Barstow nurses. (A. 455, 461; 176-91.)

B. Barstow Maintains Reporting Policies Involving Patients, Visitors, and Staff To Improve Patient Safety

Barstow has reporting processes in place to improve patient care and safety, including an on-line event report form, also referred to as an incident report. Employees complete the incident report if a noteworthy event occurs during their shift. Examples of incidents that nurses should document include: injuries or falls of patients, visitors, and staff; medication errors; patients leaving against medical advice; and infant mix-ups. Nurses receive training on the policy, the reporting system, and completion of the forms during new employee orientation. Barstow's event report form cannot be discovered in a medical malpractice suit or by the public. (A. 455, 461-62; 112-20, 421-30.)

C. The Union Develops a Form To Assist the Nurses with Patient Care and Safety and with Protection of Their Licenses

The Union created an "assignment despite objection" ("ADO") form, which nurses can use to document assignments or situations they feel may compromise patient safety or care or their nursing license. The Union distributed these forms to Barstow's nurses shortly after the election, conducted training, and made them available for the nurses' use. (A. 455, 462; 32-33, 91-92, 104, 108-09, 191-92.)

Under the ADO process, a nurse should verbally notify her supervisor about the issue and allow the supervisor to address it. If the matter remains unresolved, the nurse should then complete the form, which contains sections regarding the

reason for the objection, its potential effect, and the supervisor's response. The nurse gives a copy to her manager and the Union. Nurses using the forms continued to perform the work assignment. Further, the Union instructed the nurses to continue following Barstow's reporting procedures. The Union's form is not protected from discovery. (*Id.*)

D. The Parties Meet To Discuss Preliminary Bargaining Details; Barstow Objects to the ADO Form; When Bargaining Commences, Barstow Refuses To Bargain Until the Union Submits Its Full Contract Proposal

On July 16, Barstow and the Union held an initial meeting to discuss bargaining logistics. Stephen Matthews was the Union's lead negotiator and representative, and attorney Don Carmody was Barstow's lead negotiator and representative. A bargaining team comprised of three nurses assisted Matthews, while human resources director Jan Ellis assisted Carmody. The Union submitted an information request, and the parties discussed future dates. During this meeting, Carmody insisted that the Union stop using the ADO forms. Matthews responded that the nurses would follow Barstow's internal procedure as well as filling out the forms. (A. 455, 462; 34-38.)

On July 26, the parties held their first bargaining session. The Union presented its 82-page proposed contract with 38 articles, everything except wages.[3]

[3] The proposals covered a range of items, such as recognition, management rights, hours of work and overtime, reduction in staff, health and welfare benefits,

Carmody informed the Union that Barstow would not offer *any* proposals until the Union provided *all* of its proposals.[4] Union representative Matthews insisted that Barstow's approach amounted to bad-faith bargaining, but Carmody adamantly refused to yield. Barstow did not offer any proposals or counterproposals. (A. 455, 462; 41-48, 193-274.)

On August 1, the parties met again for bargaining. Pursuant to the unsigned pre-election agreement with Barstow's parent company, Barstow and the Union tentatively agreed to three articles that the Union submitted on July 26: recognition, union security and retirement benefits. Carmody again stated that Barstow would make no proposals or counterproposals until the Union submitted all its proposals. Once again, Matthews responded that Carmody was not bargaining in good faith. Carmody ended the meeting stating that he would make no counterproposals until he received all of the Union's proposals. (A. 455, 462; 49-53, 193-274.)

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discharge and discipline, grievance procedure and arbitration, no strikes and lockouts, bulletin board use, professional performance committee, patient needs and staffing, and technology. (A. 193-274.)

[4] In parallel negotiations between the Union and another California hospital, Fallbrook Hospital, which is also owned by Community Health, Carmody served as chief negotiator and conducted himself in an identical manner – adamantly opposing the ADO form, refusing to bargain unless the Union submitted all of its proposals, and declaring impasse over the ADO form. *See Fallbrook Hosp.*, 360 NLRB No. 73, 2014 WL 1458265 (Apr. 14, 2014), *petition for review pending*, D.C. Cir. Nos. 14-1056, 14-1094 (oral argument held Jan. 8, 2015).

E. Barstow Continues Its Refusal To Submit Proposals and Its Objection to the ADO Form and Unilaterally Changes Its Policy for Nurse Certification Trainings and Reimbursement

On August 15, the parties held their third bargaining session. The parties discussed the Union information requests, and Matthews presented a document showing that another Community Health hospital accepted the Union's ADO form. Carmody responded that it did not matter what occurred at other hospitals, Barstow would not accept the form. The meeting ended with Carmody refusing to make proposals or counterproposals until he received the Union's wage proposal. (A. 455, 462; 53-57, 193-274)

During the last week of August, the Union learned that Barstow had changed its policy on certification trainings that the nurses must renew every two years. Specifically, Barstow mandated a self-directed online program called HeartCode and capped the number of paid hours for completing trainings. (A. 456; 57-58, 110-11, SA. 6-8.)

On September 13, the parties again met for bargaining, and the Union submitted a proposal to allow nurses to obtain their certification trainings at any American Heart Association approved facility. Carmody did not respond to the proposal because he claimed he could not reach any Barstow officials for an answer. Matthews asked Carmody for proposals or counterproposals. Carmody

refused because the Union had not yet submitted its full contract proposal, and the meeting ended. (A. 455, 462; 62-67, 323.)

F. The Union Submits Its Wage Proposal; Barstow Finally Submits Proposals; the Parties Engage in Several Bargaining Sessions Before Barstow Declares the Parties at Impasse Over the ADO Form

On September 26, the parties held their fifth bargaining session, and the Union submitted its wage proposal to Ellis, who served as Barstow's representative in Carmody's absence. Ellis stated that she could only accept the Union's proposal and had no authority to bargain. Matthews responded that the Union expected proposals, but Ellis reiterated that she was there only to receive the wage proposal. The session ended without discussion of the Union's wage proposal or any proposals from Barstow. (A. 455, 462; 67-72, 275-92, 331-411.)

That same day, the Union filed a charge alleging that Barstow had violated the Act by, among other actions, refusing to submit any proposals or discuss any of the Union's proposals until the Union submitted an entire set of contract proposals and unilaterally changing the certification process for nurses. (A. 461; 139-41.)

On October 17, the parties met for the sixth time. The Union again requested proposals and counterproposals; Carmody did not offer any. After a two-hour discussion of the Union's proposals, the session ended with Carmody stating that he would provide written counterproposals on a number of articles "at

some point." Later that same day, Carmody sent Matthews a grievance and arbitration proposal and a no-strike/no-lockout proposal. (A. 455, 462; 74-76.)

On October 19, the Union amended its charge to include an additional violation related to unilateral changes in rates of pay. The parties held bargaining sessions on November 8, 14, and 29, during which Barstow submitted contract proposals. At the end of the November 29 meeting, Carmody proposed that the parties not meet again until January. The Union objected to the late scheduling, and the parties agreed to meet on December 28. (A. 455, 462; 76-82, 293-322.)

On December 27, the Regional Director issued a complaint and notice of hearing alleging that Barstow failed to bargain in good faith with the Union in violation Section 8(a)(5) and (1) of the Act.

At the December 28 bargaining session, the Union requested information about Barstow's pension plan, and the parties discussed the plan. Carmody then precipitously declared the parties at impasse over the use of the ADO form. Matthews responded that the Union intended to continue using the form, but the parties were not at impasse because the Union was willing to bargain over the use of the forms and any other issue. Carmody insisted the parties were at impasse over the form and therefore were at impasse over every issue. He also stated that the parties needed a mediator. Matthews denied the parties were at impasse, but

stated that the Union would not oppose mediation. Barstow never submitted any proposals concerning the ADO form. (A. 455, 463; 82-86.)

Later that day, Matthews sent Carmody an email recounting the events of the earlier session and reiterating the Union's willingness to negotiate over any issue, with or without mediator assistance. He resent the email on December 31. Carmody never replied. (A. 455, 462; 86, 193-274, 324-30.)

On January 10, 2013, the Union filed a second charge alleging that Barstow violated the Act by refusing to bargain unless the Union waived the nurses' right to complete ADO forms. On January 11, the parties met with a federal mediator. The mediator shuttled between the parties, who were in separate rooms. The mediator informed the Union that Carmody insisted that the parties were at impasse over the use of the forms and, therefore, were at impasse over everything. The Union maintained that the parties were not an impasse. The parties did not hold additional bargaining sessions, despite Matthews' repeated attempts to do so.

On April 30, the Regional Director issued a consolidated complaint against Barstow. An administrative law judge held a four-day hearing on the complaint allegations and found Barstow violated the Act. (A. 455, 461, 463; 86-88, 142-54.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On those facts, the Board (Chairman Pearce and Members Hirozawa and Johnson) determined, in agreement with the administrative law judge, that Barstow violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing and refusing to bargain with the Union over the terms of a collective-bargaining agreement.[5] The Board also found that Barstow violated Section 8(a)(5) and (1) by unilaterally changing terms and conditions of employment of unit employees.[6] The Board adopted the judge's finding that deferral to arbitration was inappropriate[7] and rejected Barstow's contention that it had no bargaining obligation because the underlying certification of representative issued when the Board lacked a quorum.

The Board's Order requires Barstow to cease and desist from the unfair labor practices found and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by

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[5] Member Johnson agreed that Barstow unlawfully refused to bargain over the terms of an initial bargaining agreement, but would not have found that Barstow's request for a full set of proposals – which "in other circumstances" might aid bargaining – reflected an unlawful refusal to bargain. (A. 455-56 n.5.)

[6] Member Johnson agreed that Barstow's unilateral change to its certification policy violated Section 8(a)(5) and 8(a)(1), but would have based that finding on the policy's reimbursement limitation. (A. 457 n.11.)

[7] In adopting the judge's finding, Member Johnson would have relied on the Federal Arbitration Act. (A. 455 n.3.)

Section 7 of the Act. The Board affirmatively ordered Barstow to bargain collectively and in good faith with the Union concerning terms and conditions of employment of unit employees and, if an understanding is reached, to embody it in a signed agreement; to notify, and on request, bargain with the Union before implementing changes to the terms and conditions of employment; and to rescind, at the Union's request, the HeartCode policy and make all affected unit employees whole for losses suffered. The Board also, in agreement with the judge, extended the certification by one year and directed Barstow to post a remedial notice. Further, after examining the evidence of Barstow's bad-faith bargaining, the Board ordered Barstow to reimburse the Union for expenses it incurred for the collective-bargaining negotiations held from July 26, 2012, through January 11, 2013.

SUMMARY OF ARGUMENT

1. Before the Court, Barstow fails to pursue in its Argument many of the issues listed in its Statement of Issues. This failure amounts to a forfeiture of issues 1, 5, 10, 11, 12, 13, and 15 before this Court. Further, its forfeiture of Issues 10, 11, and 12, which relate to the unilateral implementation of the HeartCode policy, as well as its forfeiture of Issue 15, which relates to the Board's extension of the certification year, entitles the Board to summary enforcement of the portions of its Order relating to that violation and special remedy.

2. Substantial evidence supports the Board's findings that Barstow violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Union. The credited evidence demonstrates that Barstow refused to bargain unless the Union submitted all of its proposals, while refusing to submit any proposals or counterproposals or discuss substantively the Union's proposals for at least five bargaining sessions over three months. Barstow's conduct evinced bad faith and a deliberate attempt to frustrate the bargaining process.

Barstow principally contests the Board's finding by relying on an unsigned pre-election agreement that its parent company negotiated with the Union and with which Barstow itself had no involvement. This unsigned agreement is insufficient to undermine the substantial evidence supporting the Board's bad-faith finding.

3. The Board's finding that Barstow violated Section 8(a)(5) and (1) of the Act by declaring impasse and conditioning bargaining on its demand that the Union direct nurses to stop using the ADO forms is similarly supported by substantial evidence. The parties never bargaining over the forms; indeed, no proposals were exchanged that purported to address the form's use or substance. Rather, Barstow was merely frustrated by the Union's use of the form, which is insufficient to establish a genuine bargaining deadlock. In the main, Barstow challenges the Board's second finding of bad faith bargaining by claiming that the

parties, in fact, bargained over the form. Barstow's claim is contrary to the record evidence.

4. The Board acted well within its broad remedial discretion and exercised its particular labor expertise when it determined that Barstow's bad-faith bargaining and deliberate efforts to prevent meaningful progress in bargaining warranted reimbursement of the Union's negotiating expenses. The Board's remedy is fully consistent with precedent and amply supported by the factual findings underpinning Barstow's statutory violations. The Board relied, in part, on Barstow's steadfast refusal to submit proposals or counterproposals and its refusal to bargain unless the Union discontinued use of the ADO form despite the Union's willingness to discuss any matter. The Board also emphasized that Barstow's misconduct occurred during the critical postelection period when the newly certified Union was highly susceptible to unfair labor practices that undermine union support. Under these circumstances, the Board reasonably exercised its remedial discretion in ordering Barstow to reimburse the Union's negotiating expenses to restore the Union's lost resources and the economic strength necessary to return the parties to the status quo.

Barstow offers the Court no basis for disturbing the Board's exercise of its remedial discretion in awarding reimbursement of the Union's negotiating expenses. In seeking to avoid imposition of this remedy, Barstow relies on

inapposite cases and an incredible claim that it could not understand that by flatly refusing to bargain or discuss the Union's proposals and by declaring impasse over the entire contract because of a single issue over which the parties had not bargained would result in the issuance of an order to reimburse the Union for its wasted time and resources.

5. The Board's determination not to defer the case to arbitration is amply supported by substantial evidence. The Board properly found that there was no mutually agreed-upon, enforceable agreement to arbitrate, and found further that the parties' immature relationship militated against a deferral to arbitration.

6. Barstow waived its challenge to the Board's certification of the Union by recognizing and bargaining with the Union, and the matter is not properly before the Court. After the parties executed a consent election agreement and the Board's Regional Director certified the Union, Barstow accepted that certification and began negotiations with the Union. Under settled law, Barstow therefore waived any challenge to the certification. If Barstow wanted to obtain judicial review of the validity of the certification, it would have needed to avail itself of the well-established test-of-certification procedures by refusing to bargain and later defending against the resulting refusal-to-bargain complaint that resulted in a final Board unfair-labor-practice order reviewable by the courts. Barstow has offered no basis for the Court to disturb the Board's finding of waiver.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTIONS OF ITS ORDER THAT RELATE TO THE ISSUES BARSTOW FORFEITED BEFORE THE COURT

Barstow lists 15 issues in its Statement of Issues (Br. 2), but fails to pursue many of them in the Argument section of its brief. Under Rule 28(a)(8)(A) of the Federal Rules of Appellate Procedure, Barstow's brief must contain its contentions "with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." As this Court has observed, "appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. Thus, failure to enforce [Rule 28(a)(8)(A)] will ultimately deprive [the Court] in substantial measure of that assistance of counsel which the system assumes – a deficiency that [the Court] can perhaps supply by other means, but not without altering the character of [the] institution." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983); *see also Altman v. SEC*, 666 F.3d 1322, 1329 (D.C. Cir. 2011); *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993) ("An issue is waived if it is not both raised in the statement of issues and pursued in the brief."); 16AA Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure*, § 3974.1 ("to assure consideration of an issue by the court, the appellant must both raise it in the 'Statement of the Issues' and pursue it in the 'Argument' portion of

the brief"). Here, counsel has made no attempt to address many of the issues stated, and the Court should not remedy the defect. Rather, the Court must decline to entertain Barstow's unanalyzed claims.

By forfeiting Issues 10, 11, and 12, which involve Barstow's unlawful implementation of the HeartCode policy, Barstow does not contest the Board's unfair-labor-practice finding that it violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the policy. Nor does it contest that portion of the Order requiring it to rescind the HeartCode policy and make whole any adversely affected employees. Further, by forfeiting Issue 15, which relates to the certification year extension, Barstow does not contest that its bad-faith bargaining warrants imposition of an affirmative bargaining order and the special remedy of a one-year extension of the Union's certification period. Barstow's waiver of these issues entitles the Board to summary enforcement of those portions of its Order. *See Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 765 (D.C. Cir. 2012).

The uncontested violations do not disappear simply because Barstow has not challenged them. Rather, they remain in the case, "lending their aroma to the context in which the [challenged] issues are considered." *NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982); *accord United States Marine Corp. v. NLRB*, 944 F.2d 1305, 1314-15 (7th Cir. 1991) (en banc).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT BARSTOW VIOLATED THE ACT BY REFUSING TO SUBMIT ANY PRPOSALS OR COUNTERPROPOSALS UNTIL THE UNION SUBMITTED ITS ENTIRE CONTRACT PROPOSAL

A. Applicable Principles and Standard of Review

Section 8(a)(5) of the Act (29 U.S.C. §158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees . . . ."[8] Section 8(d) of the Act (29 U.S.C. § 158(d)) defines the duty to bargain collectively as the obligation "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." It is a long-recognized, fundamental principle that sincere effort to reach common ground is the essence of good-faith bargaining. *NLRB v. Montgomery Ward & Co.,* 133 F.2d 676, 686 (9th Cir. 1943). The Board considers the totality of the circumstances in assessing whether a party has bargained in good faith. *NLRB v. Cauthorne*, 691 F.2d 1023, 1026 n.5 (D.C. Cir. 1982). This Court recognizes that while the question of whether an employer has conferred in good faith "is not purely factual . . . its resolution is largely a matter for the Board's

[8] A violation of Section 8(a)(5) of the Act carries a "derivative" violation of Section 8(a)(1) of the Act, which makes it unlawful for an employer to "interfere with, restrain, or coerce employees" in the exercise of rights guaranteed in Section 7 of [the Act]." 29 U.S.C. § 158(a)(1). *See Metro. Edison Co. v. NLRB,* 460 U.S. 693, 698 n.4 (1983); *Exxon Chem. Co. v. NLRB,* 386 F.3d 1160, 1163-64 (D.C. Cir. 2004). Section 7 of the Act (29 U.S.C. § 157) grants employees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . mutual aid and protection . . . ."

expertise." *Id.* (internal quotations omitted); *accord Local 13, Detroit Newspaper Printing & Graphic Union v. NLRB*, 598 F.2d 267, 272 (D.C. Cir. 1979) ("The issues raised in this context are 'delicate' ones, particularly within the expertise of the Board. . . . Accordingly, we pay great deference to the Board's decision and must affirm if it is supported in the record and reasonably based in law.") (internal citations omitted).

The Board's factual findings are "conclusive" if they are supported by substantial evidence on the record as a whole. 29 U.S.C. §160(e). A reviewing court may not displace the Board's choice between two fairly conflicting views of the facts, even if the court "would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). The Board's application of the law to the facts is reviewed under the substantial evidence standard. *NLRB v. United Ins. Co.*, 390 U.S. 254, 260 (1968).

B. Substantial Evidence Supports the Board's Finding that Barstow Refused To Bargain in Good Faith

Under Board law, a party's insistence on preconditions before discussing proposals is "antithetical to good-faith bargaining and exhibit[s] a cast of mind against reaching agreement." *Fed. Mogul Corp.*, 212 NLRB 950, 951 (1974) (finding bad faith where employer refused to offer proposals and blocked discussion of the union's proposals until the union agreed to the employer's

noneconomic proposals), *enforced*, 524 F.2d 37 (6th Cir. 1975).[9] Examples of an employer's unlawful preconditions include refusing to bargain until the union provides all of its proposals, *Fallbrook Hosp.*, 360 NLRB No. 73, 2014 WL 1458265, at *13-14 (Apr. 14, 2014), *petition for review pending*, D.C. Cir. Nos. 14-1056, 14-1094 (oral argument held Jan. 8, 2015); insisting on first obtaining the union's demands in writing, *Ardsley Bus Corp.*, 357 NLRB No. 85, 2011 WL 4830121, at *3 (Aug. 31, 2011); conditioning bargaining on the union first furnishing an agenda, *Vanguard Fire & Supply*, 345 NLRB 1016 (2005), *enforced*, 468 F.3d 952 (6th Cir. 2006); and conditioning bargaining on economic contract issues, *United Techs. Corp.*, 296 NLRB 571, 572 (1989).

The failure to submit proposals or counterproposals, in addition to unlawful preconditions also supports a finding of bad faith. For instance, in *MRA Associates, Inc.*, 245 NLRB 676, 677 (1979), the Board determined that the employer's failure to submit any proposals over the course of three bargaining sessions evinced a "basic intransigence" designed to undermine the union's negotiating efforts. *See also Health Care Serv. Group*, 331 NLRB 333, 336 (2008)

[9] Notably, in finding that the employer had acted in bad faith, the Board also relied on the employer's insistence on the union "conced[ing] exclusive control to [the employer] over matters that parties are obligated by law to bargain about and which are commonly contained in bargaining agreements." *Fed. Mogul*, 212 NLRB at 951. The employer's persistence in seeking a union waiver in that case is analogous to Barstow's insistence that the Union direct its members not to use the ADO forms.

(failure to make proposals for six months indicative of bad faith); *Bryant & Stratton Bus. Inst.*, 321 NLRB 1007, 1042 (1996) (observing that a party's failure to pursue proposals or exchange proposals for five months is dilatory and evidence of bad-faith bargaining), *enforced*, 140 F.3d 169 (2d Cir. 1998); *Hydrotherm, Inc.*, 302 NLRB 990, 1005 (1991) (bad faith included what the employer failed to propose – after three months and seven sessions, it "failed to propose anything at all concerning the heart of collective bargaining, namely, economics," despite having received two wage proposals from the union).

On the basis of the foregoing, the Board determined (A. 455) that Barstow engaged in bad-faith bargaining by refusing to bargain until it received all of the Union's proposals. Further, the bargaining was defined by Carmody's late arrivals, abrupt departures, extended caucusing, and meeting cancellations. The record establishes that after three months and five sessions Barstow finally began to submit counterproposals. Before then, Barstow flatly refused to offer any proposal until it received each and every Union proposal for the entire contract and refused to engage in any substantive discussion of the Union's proposals.

C. Barstow's Claims of Good-Faith Bargaining Are Meritless

Barstow unconvincingly cites (Br. 34-35) the unsigned pre-election agreement between Barstow's parent company and the Union in an effort to undermine the substantial evidence of Barstow's bad faith. First, Community

Health and the Union negotiated these articles prior to the election; therefore, they have little bearing on the Board's finding that Barstow bargained in bad faith post-election. Second, the Union included the three pre-election articles in its opening set of proposals. Barstow and the Union never substantively discussed or bargained over these articles and only signed off on them on August 1. (A. 51-52.) Accordingly, Barstow cannot rely on them (Br. 35) as evidence of its good-faith bargaining since it was the Union, and not Barstow, that came forward with proposals.[10]

Barstow's suggestion (Br. 36) that it did not engage in bad-faith bargaining because it did not commit additional violations of the Act by refusing to provide information borders on frivolous. The Board reasonably found that Barstow's misconduct at the table was sufficient, standing alone, to support a finding of bad-faith bargaining, without additional violations. Equally unavailing is Barstow's attempt to cast (Br. 36) its conduct as simply "hard bargaining." Contrary to its recitation of the facts, the Board found that Barstow did, in fact, refuse to consider, discuss, respond to, and counter any of the Union's proposals until the Union had submitted its entire contract proposal. (A. 455, 458, 463.) Further, the cases on which it relies are readily distinguishable. *See, e.g.*, *Atlanta Hilton & Tower*, 271

[10] Moreover, Barstow cannot rely on the unsigned pre-election agreement (Br. 34) to undermine the Board's finding that there was no agreement between the parties to arbitrate disputes. For reasons discussed below, pp. 40-42, Barstow's understanding of the unsigned agreement misses the mark.

NLRB 1600, 1604 (1984) (no bad faith where employer attended 13 sessions, agreed to a sick leave proposal and wage increase, and had a prior successful bargaining relationship with the union, despite employer's counterproposal to extend the existing contract); *Litton Sys.*, 300 NLRB 324, 327 (1990) (no bad faith where employer attended 53 meetings, offered extensive explanations and examination of the union's proposals, reached agreement on 23 topics, made significant concessions, and did not procedurally frustrate process), *enforced*, 949 F.2d 249 (8th Cir. 1991).[11]

Further, Barstow erroneously posits (Br. 36) that the Board treated its sequencing of proposals as a *per se* violation of the Act. Rather, the Board found, *based on these facts*, that Barstow engaged in bad-faith bargaining. A broader reading of the Board's decision is unfounded and unsupported by the decision itself.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT BARSTOW VIOLATED THE ACT BY DECLARING IMPASSE AND REFUSING TO BARGAIN UNLESS THE UNION DIRECTED UNIT EMPLOYEES TO STOP USING THE ADO FORM

A. Standard of Review and Applicable Principles

As noted above (pp. 20-21), this Court gives great deference to the Board's factual findings. *W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1348 (D.C.

[11] *Silver Brothers Co.*, 312 NLRB 1060 (1993) involves changing agreed-upon bargaining locations, not hard bargaining.

Cir. 2008). The determination of whether an impasse exists is a question of fact and "is an inquiry particularly amenable to the experience of the Board as a factfinder." *Lapham-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180, 1185 (7th Cir. 1990) (internal quotations omitted). The Court will not disturb the Board's finding of impasse unless it is irrational or unsupported by substantial evidence. *Teamsters Local 175 v. NLRB*, 788 F.2d 27, 30 (D.C. Cir. 1986). Indeed, as this Court has recognized, "in the whole complex of industrial relations few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of [the Board,] which deals constantly with such problems." *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1083 (D.C. Cir. 1991) (internal quotation omitted).

A stalemate in negotiations constitutes a good-faith impasse only when "there [is] no realistic prospect that continuation of discussion at that time would [be] fruitful," *Am. Fed. of Tele. & Radio Artists v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968), and "after good-faith negotiations have exhausted the prospects of concluding an agreement." *Teamsters Local 175*, 788 F.2d at 30 (citations omitted). The burden of proving impasse rests with the party asserting it. *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 347 (D.C. Cir. 2011).

The Board looks at the totality of the circumstances in determining whether impasse exists. *Grinnell Fire Protection Sys., Co.*, 328 NLRB 585, 586 (1999),

enforced, 236 F.3d 187 (4th Cir. 2000). In doing so, the Board considers the "bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broad. Co.*, 163 NLRB 475, 478 (1967), *enforced*, 395 F.2d 622, 628 (D.C. Cir. 1968). There can be no impasse unless "[b]oth parties in good faith believe that they are at the end of their [bargaining] rope." *PRC Recording Co.*, 280 NLRB 615, 635 (1986), *enforced*, 836 F.2d 289 (7th Cir. 1987). Further, impasse must generally be reached not as to one or more discrete contractual items, but on the agreement as a whole. *Wayneview*, 664 F.3d at 349-50.

B. Substantial Evidence Supports the Board's Finding that Barstow Engaged in Bad-Faith Bargaining By Declaring Impasse and Refusing To Bargain Until the Union Took Certain Actions

As shown above (pp. 11-12), the credited evidence establishes that the parties were not at impasse at the time that Barstow unilaterally abandoned bargaining. As the Board observed, Barstow "adamantly and repeatedly refused to respond to the Union's requests for future bargaining dates, despite the Union's open invitation to discuss any matter, including the ADO forms." (A. 458.) According to the uncontroverted and credited testimony, once Carmody declared impasse on all issues, Matthews responded that, "we're here to bargain over

everything. We have movement on every issue and we are not at impasse over any issue. You need to sit down and bargain." (A. 83, 407-08.) Carmody replied, "You heard me, I am done," and then left the room six minutes after the session had begun. (A. 83-84, 175, 354, SA. 1-3.) The Board determined that Barstow's abrupt and repeated insistence on impasse was not true deadlock. (DA. 455, 463.) *See, e.g.*, *Powell Elec. Mfg. Co.*, 287 NLRB 969, 973 (1987) ("[The] parties had most of their work ahead of them . . . . Whether their differences ever would have been resolved cannot be known; but that is the nature of the process. It is for the parties through earnest, strenuous, tedious, frustrating and hard bargaining to solve their mutual problem – getting a contract – together, not to quit the table and take a separate path."), *enforced in relevant part*, 906 F.2d 1007 (5th Cir. 1990).

Further, the Board found that Barstow's premature declaration of impasse and subsequent refusal to bargain until the Union directed employees to cease using the forms was equally unlawful because Barstow never sought to bargain over the forms. "In none of the bargaining sessions did either party make a proposal regarding the use of the [] forms, nor did they bargain over them." (A. 463.) Accordingly, Barstow violated the Act by declaring impasse and refusing to bargain unless the Union ceased using the forms where the parties had not bargained over the issue, let alone reached a true deadlock.

C. Barstow's Claims that It Declared Impasse In Good Faith Are Meritless

Barstow fruitlessly proclaims (Br. 37-42) that the parties bargained over the ADO form. The record is devoid of any such bargaining. All Barstow manages to show is that the ADO form, among other uses, assisted the Union in gathering information for bargaining on issues of concern to its members. Barstow's references to the ADO form as a "pipeline" (Br. 40) and a "snake lurking in the grass" (Br. 42) do not advance its arguments that the parties bargained over the form's use or content. To show that the parties engaged in bargaining over the form requires more than colorful references and flat rejections; it requires, at a minimum, proposals.

In attempting to demonstrate bargaining, Barstow relies (Br. 37-38) on the Union's proposal for a committee whose function it claims would be similar to that of the ADO form – patient care and protection of the nurses' licenses. Even assuming for the sake of argument that the form was "inseparable" from the Union's proposal (Br. 40) and that the Union's proposal was "inextricably tied" to the form (Br. 37), evidence that Barstow responded in any way to the proposal is glaringly absent. Barstow cannot rely on the mere existence of a union proposal, to which it refused to respond, as evidence that it bargained in good faith to impasse.

In its challenge to the remedy, Barstow also asserts (Br. 45-46), without record support, that the Union's offer to bargain over any issue was "illusory." As the Board decision makes clear (A. 455, 462-63), the record is replete with evidence that the Union expressed a genuine willingness to bargain over the form or any other issue – offers that were met with Barstow's obstinate refusals. The record establishes that it was Barstow that refused to bargain and declared impasse over all issues without even a single proposal over the form.

Likewise, Barstow has failed to demonstrate (Br. 42 n.18, 46-47) that it was privileged to declare impasse over the whole agreement on the basis of the ADO form.[12] As this Court has recognized, while deadlock on a single issue can justify an overall finding of impasse, "[t]he Board has long distinguished between an impasse on a single issue that would not ordinarily suspend the duty to bargain on other issues and the situation in which impasse on a single or critical issue creates a complete breakdown in the entire negotiations." *Wayneview Care*, 664 F.3d at 349-50 (internal quotations and citation omitted). Further, the party asserting impasse must prove that the deadlocked issue is critical and "that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved." *Id.* at 350 (internal quotations and citation omitted). In this

[12] Barstow cites (Br. 42 n.18) to *Saint Gobain Abrasives*, 343 NLRB 542 (2004), *enforced*, 426 F.3d 455 (1st Cir. 2005), which is inapposite as it does not involve a lawful impasse based on a single issue.

regard, Barstow has failed. It has not attempted to show that the parties could not make progress on any of the remaining issues, nor could it. On November 29, 2012, the Union submitted counterproposals moving toward Barstow's position on 13 articles. Barstow declared impasse without responding to these proposals. Further, there is no evidence that Barstow ever responded to the Union's wage proposal or to several of the Union's July 26 proposals, such as technology, bulletin board use, resolution of staffing disputes, nursing process standards, or staffing ratios. In these circumstances, the Board reasonably found Barstow unlawfully declared impasse.

IV. THE BOARD PROPERLY EXERCISED ITS BROAD REMEDIAL DISCRETION IN ORDERING BARSTOW TO REIMBURSE THE UNION FOR ITS NEGOTIATING EXPENSES

A. Standard of Review and Applicable Principles

The Board enjoys broad discretion in crafting appropriate remedies for violations of the Act. *See, e.g., Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (Board's authority to issue remedies is a "broad discretionary one, subject to limited judicial review"); *accord United Food & Commercial Workers Int'l Union v. NLRB*, 852 F.2d 1344, 1347 (D.C. Cir. 1988) ("*UFCW*"). Under Section 10(c) of the Act (29 U.S.C. § 160(c)), the Board is directed to order remedies for unfair labor practices. The Supreme Court "has repeatedly interpreted this statutory command as vesting in the Board the primary

responsibility and broad discretion to devise remedies that effectuate the policies of the Act." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984); *accord Cobb Mech. Contractors, Inc. v. NLRB*, 295 F.3d 1370, 1375 (D.C. Cir. 2002) ("[T]he Board is accorded broad discretion in fashioning an appropriate remedy.").

The Board's remedial order is "subject to limited judicial review," *UFCW*, 852 F.2d at 1347, and its "choice of remedies is entitled to a high degree of deference." *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 399 (D.C. Cir. 1981); *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1009 (D.C. Cir.1998) ("a reviewing court must give special respect to the Board's choice of remedy"). This deferential standard flows from the recognition that "[i]n fashioning its remedies under the broad provisions of Section 10(c) of the Act . . . the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969). As such, a reviewing court must enforce the Board's choice of remedy unless a challenging party can show "that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); *accord United Food & Commercial Workers Union v. NLRB*, 447 F.3d 821, 827 (D.C. Cir. 2006).

Section 10(c) of the Act expressly authorizes the Board to order a violator of the Act, not only to cease and desist from the unlawful conduct, but also "to take such affirmative action . . . as will effectuate the policies of th[e] Act." The Board's task under Section 10(c) is to restore the status quo ante – in other words, "to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769 (1975). Moreover, in devising an appropriate remedy, the Board attempts to "both compensate the party wronged and withhold from the wrongdoer the 'fruits of its violation.'" *Mead Corp. v. NLRB*, 697 F.2d 1013, 1023 (11th Cir. 1983) (citation omitted); *see also Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 415 (D.C. Cir. 1996).

B. The Board Reasonably Determined that Barstow's Deliberate Bad-Faith Bargaining Warranted Reimbursement of the Union's Negotiating Expenses

The Board's statutory authority to fashion appropriate remedies includes the discretion to order special remedies when necessary "to dissipate fully the coercive effects of the unfair labor practices." *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) (citing cases), *enforced in relevant part*, 97 F.3d 65 (4th Cir. 1996). The Board has determined that a special remedy is warranted when an employer engages in unusually aggravated misconduct that is "calculated to thwart the entire collective-bargaining process and forestall the possibility of . . . ever reaching

agreement with the chosen representative of its employees." *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995), *enforced in pertinent part sub nom. Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997)) ("*Frontier*"). Under such circumstances of egregious misconduct, the appropriate remedy – both to restore the status quo ante and to dissipate fully the effect of the violations – is reimbursement of the union's negotiating expenses. *Id.* at 859. The Board reasons that where an employer willfully defies its statutory obligation, the union has wasted resources in a futile exercise. *Id.*; *see also NLRB v. HTH Corp.*, 693 F.3d 1051, 1061 (9th Cir. 2012) (upholding several special remedies, including negotiating expenses, where "[u]nion wasted resources over a period of years during which [employer] had no intention of reaching an agreement"); *Fallbrook Hosp.*, 2014 WL 1458265, at *4-5 (ordering negotiating expenses where employer refused to bargain until the union submitted its entire contract proposal and then prematurely declared impasse over a single issue).

An order awarding negotiation expenses effectuates the policies of the Act by making "the charging party whole for the resources that were wasted because of the unlawful conduct, and [restoring] the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table." *Frontier*, 318 NLRB at 859 (citations omitted). Reimbursement for negotiating expenses also creates an incentive for the parties to bargain in good faith and prevents advantages gained by

a party's unlawful conduct. *See Virginia Elec.*, 319 U.S. at 541 (a Board remedy "is a permissible method of effectuating the statutory policy" where it "places the burden upon the [employer] whose unfair labor practices brought about the situation" and it "deprives [the] employer of advantages accruing from a particular method of subverting the Act"); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193 (1941) (Board acts appropriately where it takes action to "give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining").

Here, the Board reasonably exercised its discretion and determined that traditional remedies would not eliminate the effects of Barstow's misconduct. The Board, therefore, imposed two special remedies – a one-year extension of the certification period and reimbursement of negotiating expenses – to "remedy the detrimental effect [Barstow's] unlawful conduct has had on the bargaining process." (A. 458.) Barstow does not challenge the extension of the certification year.[13]

[13] Under Board law, an extension of the certification period is only appropriate where "an employer has refused to bargain with the elected bargaining representative during part or all of the year immediately following the certification, that it has 'taken from the Union' the opportunity to bargain during the period when unions are generally at their greatest strength." *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004), *enforced*, 156 Fed. App'x 331 (D.C. Cir. 2005) (internal citations omitted). Barstow therefore does not contest that it has "taken from the Union" the opportunity to bargain between July 2012, and January 2013.

The Board based its award of negotiating expenses on Barstow having "deliberately acted to prevent any meaningful progress during bargaining sessions" (A. 458) and on Barstow's "deliberate refusal to bargain in good faith [that] occurred in the critical postelection period when the Union, as a newly certified collective-bargaining representative was highly susceptible to unfair labor practices tending to undermine the employees' support for the Union." (A. 458-59.) The Board observed that Barstow steadfastly refused to provide any proposals or counterproposals during the first five bargaining sessions until the Union satisfied its unlawful demand for a full contract proposal. Then after three more sessions, Barstow threatened to abandon bargaining if the Union persisted in encouraging unit employees to use the ADO form. The Board also considered Barstow's erroneous claim that the Union's use of the form caused the parties' impasse. Thereafter, Barstow "adamantly and repeatedly refused to respond" to the Union's multiple bargaining requests despite the Union's "open invitation" (A. 458) to bargain over any matter. Lastly, the Board observed that the misconduct occurred right after the Union won the initial election.[14]

[14] Barstow misunderstands (Br. 43) the significance of the newly certified Union. By relying, in part, on the Union's incipient status as the exclusive representative, the Board recognizes that a new union must demonstrate strength to its members and that violations at this inchoate stage can more negatively affect bargaining than violations against a long-serving union.

In considering an award of negotiating expenses, the Board examines whether the violations infected the core of bargaining such that the traditional remedy is insufficient. According to the Board, Barstow's deliberate misconduct "directly caused the Union to waste its resources in futile bargaining." *Id.* Under these circumstances, not only did Barstow eliminate the Union's strength of bargaining when union support was generally at its height, it also wasted the Union's time and resources in a "futile pursuit of a collective-bargaining agreement." *Harowe Servo Controls, Inc.*, 250 NLRB 958, 964-65 (1980); *see, e.g., O'Neill, Ltd.*, 288 NLRB 1354, 1356-57, 1387 (1988) (ordering employer to reimburse union for resources that it wasted in useless bargaining where employer caused bargaining to be a "complete and utter sham"), *enforced*, 965 F.2d 1522 (9th Cir. 1992) . The Union fruitlessly expended time and financial resources associated with arranging dates to be available for bargaining, developing and drafting proposals and counterproposals, and keeping union members apprised of bargaining efforts. There is an "undeniable causation between [Barstow's] misconduct and the useless expenditure of the Union's resources in their attempts to bargain." *HTH*, 693 F.3d at 1061. Accordingly, the Board properly directed Barstow to bear the costs of its violations. *See, e.g., NLRB v. Rutter-Rex Mfg. Co.*, 396 U. S. 258, 264-65 (1969) (wrongdoing employer must bear the costs stemming from its violations); *HTH*, 693 F.3d at 1061 ("[employer] is not entitled to benefit

financially from the consequences of the delay created by its unlawful bargaining tactics").

C. Barstow's Challenges to the Board's Remedy Are Meritless

Barstow first claims (Br. 44) that it could not know that its conduct – including its refusal to provide any proposals or counterproposals, its refusal to discuss the Union's proposals, and its precipitous declaration of impasse over the entire contract on the basis of a single not-yet-bargained issue – could provide the basis for a Board finding of unusually aggravated misconduct. Quite simply, the claim is indefensible. Barstow engaged in deliberate misconduct with a singular goal: to thwart the bargaining process.[15]

Moreover, Barstow's reliance on (Br. 45) the Union's ability to advance proposals has nothing to do with whether Barstow itself deliberately frustrated the bargaining process by refusing to submit proposals or counterproposals. Nor do the Union's updates highlighting discrete gains – which are more propaganda than probative – somehow negate the Board's finding that Barstow wasted the Union's time and resources by never attempting to reach an agreement.

Barstow's cites (Br. 47 n.21) inapposite cases for the unsupported claim that the Board has "never" (Br. 47) ordered negotiating expenses where the employer

[15] Barstow's reliance on (Br. 44 n.20) *Columbia College Chicago*, 2013 WL 11224499 (Mar. 15, 2013), is misplaced because that case is currently pending review before the Board.

has prematurely declared impasse. In both *Mike-Sell's Potato Chip Co.*, 360 NLRB No. 28, 2014 WL 180485, at *16 (Jan 15, 2014), *petition for review pending*, D.C. Cir. Nos. 14-1021, 14-1031, and *Hotel Bel-Air*, 358 NLRB No. 152, 2012 WL 4472224 (Sep. 27, 2012), *incorporated by reference in* 361 NLRB No. 91, 2014 WL 5524391 (Oct. 31, 2014), the Board found that the employers – unlike Barstow – had engaged in good-faith negotiations during multiple sessions and made significant progress before declaring impasse.

Lastly, Barstow takes issue (Br. 47) with the Board's case-by-case approach, claiming that other employers engaged in "further misconduct" without the Board awarding negotiating expenses. As a preliminary matter, it bears repeating that whether an employer has engaged in unusually aggravated misconduct that infects the core of bargaining invokes the particular and unique expertise of the Board. That said, the cases cited by Barstow (Br. 47) do little to inform the appropriateness of the award here because those cases are readily distinguishable. In *Bryant & Stratton*, for example, the parties were bargaining over a wage change, not an entire agreement, and the parties had an existing ten-year relationship. 327 NLRB at 1136. In *Success Village Apartments, Inc.*, the employer and the union similarly had an established 25-year relationship. 347 NLRB 1065, 1066 (2006). In *AMF Bowling Co. v. NLRB*, the employer did not engage in any bad-faith bargaining. 977 F.2d 141, 144 (1st Cir. 1992). Given the difference in the parties'

relationships and the particular violations, these cases do not support Barstow's claim that negotiating expenses were unwarranted. Moreover, Barstow's plaint that whether the Board will award negotiating expenses is a "complete guessing game" (Br. 48) unjustly disparages the Board for declining to write a playbook for would-be offenders for conduct that violates the Act but is not so egregious as to result in financial reimbursement to the wronged party.

V. THE BOARD REASONABLY DECLINED TO DEFER THE CASE TO ARBITRATION

The Board determined that deferral to arbitration was not appropriate in this case because there was no mutually agreed-upon grievance-arbitration procedure and because of the infancy of the collective-bargaining relationship. The Board's findings are supported by substantial evidence and consistent with law.

A. The Board Properly Found that There Is No Agreed-Upon Grievance-Arbitration Procedure and the Parties Lacked a Long and Productive Relationship

As the Board observed (A. 455 n.3, 465), and Barstow admits (Br. 28), the parties never signed the pre-election agreement containing the arbitration clause at issue. The unsigned agreement evinces the parties' clear intent not to be bound to the agreement. Paragraph 14 of the draft agreement stated: "Neither party to this Agreement shall be bound to any of its provisions solely by the presence of such provision in any draft hereof *unless and until this Agreement is signed by such party*." (A. 431-52) (emphasis added). Given this express condition, which was

never met, the Board reasonably declined to infer a mutual agreement to mandate arbitration of all disputes between the two parties.[16] *See, e.g., N.D. Peters & Co.*, 327 NLRB 922, 925 (1999); *Arizona Portland Cement Co.*, 281 NLRB 304, 304 n.2 (1986).

Additionally, the Board has long considered the length of the parties' collective-bargaining relationship in determining the appropriateness of deferral. *See, e.g., United Techs. Corp.*, 268 NLRB 557, 558 (1984) (listing relevant factors, including whether the dispute arose within the confines of a long and productive relationship). For example, where a union had only been the exclusive bargaining representative for one year and the collective-bargaining agreement had only been in place for six months, the Board refused to find a long and productive relationship warranting deferral. *See San Juan Bautista Med. Ctr.*, 356 NLRB No. 102, 2011 WL 702297, at *2 (Feb. 28, 2011). According to the Board, "[w]hatever

[16] Notably, the district court reached the same conclusion in the 10(j) proceedings after Barstow moved the court to reconsider its decision to grant the temporary injunction based on testimony before the administrative law judge in this case that Barstow asserted – as it does here – showed that the parties had agreed to arbitrate all disputes. In rejecting the claim, the court stated: "The transcripts appended to the Post-Hearing Supplement contain ambiguous and oblique references to various agreements and proposals. After re-examining those transcripts, it does not appear to the Court that [the Union] and Barstow entered into an oral collective bargaining agreement. And, even assuming *arguendo* that the transcripts indicated the existence of some type of oral agreement, it does not indicate what the terms of that agreement are." *Rubin v. Hosp. of Barstow, Inc.*, No. ED CV 13-933, 2013 WL 4536849, at *2 (C.D. Cal. Aug. 26, 2013).

the nature and merits of these disagreements, their existence indicates the relationship between the Union and [the employer] had not matured." *Id.*

The same principle applies here. The parties had only been bargaining intermittently for a first contract for six months before Barstow called off negotiations and declared the parties at impasse. During this time, the Union filed three charges, and the Board found that Barstow bargained in bad faith and unlawfully declared impasse. These facts demonstrate that the parties' relationship had not yet matured. As the Board noted in *San Juan Bautista*, "[w]e are unaware of any decision finding that a relationship as new and contentious as the one at issue here can be considered 'long and productive' for the purposes of a [deferral]. . . ." 2011 WL 702297, at *2; *see also Beverly Enters.*, 310 NLRB 222, 257-58 (1993), *enforced in relevant part sub nom. Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580 (2d Cir. 1994) (deferral inappropriate where relationship was under two years old and the employer committed four violations during that time).

B. Barstow's Challenges to the Board's Non-Deferral Are Meritless

Barstow first erroneously suggests (Br. 28) that the administrative law judge and the Board reached "opposite" findings that the parties never executed an agreement and that no such agreement existed, respectively. The two findings are entirely consistent and simply represent two different ways to state the same

finding: no valid agreement existed because it was unexecuted. Indeed, the document itself establishes this finding in that it predicates its validity on signatures evincing a desire to be bound by the terms. Barstow was unable to produce any document bearing the parties' signatures.

Similarly, Barstow's claim (Br. 28-31) that the unexecuted agreement is binding because the parties performed as if it were enforceable fails for the same reasons. By its terms, the document is not valid in the absence of signatures – a limitation not overridden by performance. Moreover, Barstow's reference (Br. 28-30) to arbitrations between the parties does not undermine the Board's finding. The record contains only scant and vague information regarding two pre-election telephonic arbitrations, one of which concerned a campaign flyer. The record does not support a finding that the parties intended this process to persist beyond the election, and this thin evidence cannot overcome the unambiguous terms of the unsigned agreement.[17]

Barstow's attempt (Br. 29-30) to distinguish *Arizona Portland Cement* is unavailing. *Arizona Portland Cement* stands for the basic proposition that, in the absence of a mutually agreed-upon grievance-arbitration procedure, the Board will

[17] It is not entirely clear that the performance that Barstow highlights (Br. 28-29) has any bearing on disputes arising *after* the certification. Rather, the testimony of union organizer Roy Hong was limited to pre-election activities – campaign literature and facility access for campaigning. Indeed, according to Hong, his role ended just after the election. (SA. 4-5.)

not defer a case to arbitration. 281 NLRB at 304 n.2. The reason for the absence of mutual agreement is not significant, whether it be contract expiration, unexecuted contract, or otherwise. Thus, regardless of why no agreement exists, in its absence, the Board will properly not defer a case to arbitration.

Barstow also makes the weak claim (Br. 31) that the Board accorded too much weight to the parties' relationship. As discussed above, the Board relied on (A. 455 n.3) *San Juan Bautista* and the cases cited therein, which fully support the determination that a six-month-old relationship during which the Union filed three unfair-labor-practices charges is insufficient to support deferral. The Board properly saw no reason to consider the other deferral factors because there was no enforceable agreement and no relationship to speak of. Barstow conveniently ignores these facts in attempting (Br. 32-33) to have the Court reweigh the facts regarding the nature of the parties' relationship. Barstow's very characterizations of the relationship betray its lack of productivity and maturity – referring to the Union's lawful choice to pursue its statutory rights as a "play" and non-honorable.[18] (Br. 33.)

[18] Because the Union was exercising its statutory right to have the Board resolve unfair-labor-practice charges, Barstow's assertion (Br. 33-34) that the Board, in processing the charges, has somehow undermined its basic responsibility and done a disservice to the labor law community is unsupported hyperbole.

VI. BARSTOW WAIVED ITS CHALLENGE TO THE CERTIFICATION BY RECOGNIZING AND BARGAINING WITH THE UNION

The certification of the Union as the exclusive bargaining representative of Barstow's employees is not a matter properly before the Court. Here, after the Regional Director certified the Union on June 29, 2012, Barstow recognized and bargained with the Union. As the Board found (A. 455 n.5), in doing so, Barstow chose not to test the certification and therefore waived all objections to the certification. As the Court has explained, "[an] employer must either bargain unconditionally or, if it wants to contest the union's right to represent the employees, refuse to bargain and defend itself in an unfair labor practice proceeding." *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 225-26 (D.C. Cir. 1996).

To obtain judicial review of the certification, Barstow was required to avail itself of the well-established test-of-certification procedures, namely, refusing to bargain and later defending against the resulting refusal-to-bargain complaint by asserting an affirmative defense that the certification was improper. *See NLRB v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 112 (D.C. Cir. 2012) (refusal to bargain "sets up judicial review of an election certification that is otherwise insulated from direct review"). Only when an employer follows this procedure, which results in the issuance of a final Board unfair-labor-practice order reviewable by the courts under Section 10 (e) and (f) of the Act (29 U.S.C. § 160(e) & (f)), are the

certification and the record upon which it was based before the Court. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964); 29 U.S.C. § 159(d).

The Board, with court approval, has long held that an employer that fails to follow this procedural course, and instead commences bargaining, waives the right to contest the certification. *See Nursing Ctr. at Vineland*, 318 NLRB 901, 904 (1995); *Technicolor Gov't Servs. v. NLRB*, 739 F.2d 323, 326-27 (8th Cir. 1984); *King Radio Corp. v. NLRB*, 398 F.2d 14, 20 (10th Cir. 1968); *Peabody Coal v. NLRB*, 725 F.2d 357, 363 (6th Cir. 1984) (observing that an employer jeopardizes its certification challenge by consulting with a union), *overruled on other grounds, Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996); *see also Mission Produce, Inc.*, 362 NLRB No. 15, 2015 WL 502320 (Feb. 5, 2015) (rejecting as untimely an employer's challenge to the recess appointments where parties entered into a stipulated election agreement and employer raised the issue for first time in election objections). "Once an employer honors a certification and recognizes a union by entering into negotiations with it, the employer has waived the objection that the certification is invalid." *Technicolor*, 739 F.2d at 327.

Barstow's attempt o disavow its established bargaining relationship through a belated attack on the certification is contrary to the purposes of the Act. The Board's policy of rejecting untimely challenges to election certifications is consistent with a prime purpose of the Act – fostering industrial peace through

collective bargaining – and, as shown, that policy has met with judicial approval. Here, the Board (A. 455 n.5) expressly rejected Barstow's belated claim on that basis, and the Court should as well.

Contrary to Barstow's assertion, it had every opportunity to raise its challenge to the certification in the representation case, and it failed to do so at any point. Barstow's sole excuse for failing to raise it in the representation case (Br. 18-19) is the claim that its challenge to the Regional Director's authority to issue the June 29, 2012 certification was unavailable to it before the January 25, 2013 decision of this Court in *Noel Canning v. NLRB*, 705 F.3d 490, *affirmed on other grounds*, 134 S. Ct. 2550 (2014). Barstow, however, had every reason and opportunity to mount a timely challenge. The potential legal grounds on which Barstow might have asserted such a claim of ultra vires action – that the recess appointments were invalid and the Board therefore lacked a quorum at the time the Regional Director certified the Union – are the same constitutional arguments that had previously been considered in published decisions by three courts of appeals. *See Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (*en banc*); *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (*en banc*); *United States v. Allocco*, 305

F.2d 704 (2d Cir. 1962).[19] Indeed, the petition for review in *Noel Canning* was filed Court on February 24, 2012.

In sum, Barstow waived any challenge to the certification by choosing to forego the long-established procedural route for challenging a certification and instead commencing negotiations with the Union.[20] Under these circumstances, there is no reason to depart from the bedrock rule of appellate procedure that challenges not timely asserted are forfeited. *See United States v. Olano*, 507 U.S. 725, 731 (1993) ("No procedural principle is more familiar . . . than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal

[19] Barstow cannot hide behind its claim (Br. 18, 21) that the Ninth Circuit's decision in *Woodley* "would have undermined any challenge" to the appointments. The sole recess question decided in *Woodley* concerned when the vacancy had to arise. The decision did not address other possible challenges to the January 2012 Board appointments, including whether recess appointments could be made during intrasession Senate recesses and whether the President's recess appointment powers may be exercised when the Senate is convening every three days in pro-forma sessions. Moreover, Barstow could have brought any petition to review a Board order in this Court under Section 10(f) of the Act.

[20] In light of Barstow's clear waiver of its challenge to the Regional Director's authority, the Board does not address the merits of Barstow's challenge, which principally rests on the Court's decision in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009). Similar challenges, however, have been fully briefed in two cases pending before the Court involving refusals to bargain in order to test union certifications. *See UC Health v. NLRB*, D.C. Cir. Nos. 14-1049, 14-1193 (oral argument scheduled for Feb. 18, 2015), and *SSC Mystic v. NLRB*, D.C. Cir. Nos. 14-1045, 14-1089 (oral argument scheduled for Feb. 24, 2015).

having jurisdiction to determine it.") (internal quotation marks omitted). That principle applies to claims that the actions of government officials are ultra vires. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (rejecting belated challenge to hearing examiner's authority, while acknowledging that the defective appointment would have invalidated the resulting order "if the [Agency] had overruled an appropriate objection made during the hearings"); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 706-07 (D.C. Cir. 1996) (constitutional defect in FEC's composition was an affirmative defense to an enforcement action and could be forfeited if not timely asserted); *NLRB v. Newton-New Haven Co.*, 506 F.2d 1035, 1038 (2d Cir. 1974) (declining to grant relief on a forfeited challenge to Board panel composition because the claim was untimely, notwithstanding that the court had previously upheld a similar challenge).

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court should enter judgment enforcing the Board's Order in full and denying the petition for review.

Respectfully submitted,

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MARCH 2015

ADDENDUM

Section 7 (29 U.S.C. § 157)

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a)(1) (29 U.S.C. § 158(a)(1))

It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

Section 8(a)(5) (29 U.S.C. § 158(a)(5))

It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 8(d) (29 U.S.C. § 158(d))

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

Section 10(a) (29 U.S.C. § 160(a))

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

Section 10(c) (29 U.S.C. § 160(c))

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or

international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

Section 10(e) (29 U.S.C. § 160(e))

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and

to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Section 10(f) (29 U.S.C. § 160(f))
Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Section 10(j) (29 U.S.C. § 160(j))
The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have

jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

UNITED STATES COURT OF APPEALS
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HOSPITAL OF BARSTOW, INC. d/b/a BARSTOW COMMUNITY HOSPITAL	)	
Petitioner/Cross-Respondent	)	Nos. 14-1167, 14-1195
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos. 31-CA-090049
Respondent/Cross-Petitioner	)	31-CA-096140

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,598 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC
this 24th day of March, 2015

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Respondent/Cross-Petitioner	)	31-CA-096140

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they a registered user or, if they are not by serving a true and correct copy at the address listed below:

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